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REAL PROPERTY: PURCHASE, SALE, TITLE, AND OWNERSHIP

by

Robert T. Brousseau*

DURING the Survey period numerous cases were decided in the area of real property. The courts addressed disputes concerning the use of land, restrictive covenants and easements, and specific performance. Actions involving real estate brokers occupied the appellate courts as well. Significant legislative changes also took place during the survey period.

I. CONTRACTS FOR THE SALE OF LAND

A. Specific Performance

Five cases during the Survey period addressed questions of specific performance in real estate contracts. In *Lubel v. J.H. Uptmore & Associates*¹ the buyer brought suit for reformation and specific performance of a contract to sell land after the seller refused performance claiming insufficiency of the property description. A map attached to the earnest money contract with the disputed property outlined in red constituted the only admissible description of the property. The trial court found the description insufficient under the Statute of Frauds² and entered a directed verdict for the seller.³

While not disputing the insufficiency of the map, the buyer argued on appeal that the two part exception to the general rule of the Statute of Frauds set forth in *Morrow v. Shotwell*⁴ applied to the case. The exception allows reformation and specific performance of a contract for the sale of real estate (1) if strong evidence exists that both parties intended the inclusion of a description of a specific tract in the sales contract, and (2) if both parties to the contract were mutually mistaken in the belief that the included property description met all legal requirements.⁵ The court, however, held that no strong evidence existed to indicate that the seller intended to convey a specific tract of land.⁶ The buyer and seller had no prior business relationship

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1. 680 S.W.2d 518, 518 (Tex. App.—San Antonio 1984, no writ).

2. TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1968) (requiring a writing and signature for real estate sales contracts).

3. 680 S.W.2d at 519.

4. 477 S.W.2d 538, 541 (Tex. 1972).

5. 680 S.W.2d at 520; *Morrow*, 477 S.W.2d at 541.

6. 680 S.W.2d at 520.

regarding a specific tract that would indicate that both parties knew to which tract the contract pertained.⁷ Furthermore, the buyer never took possession of any specific tract. The map attached to the earnest money contract described the property only in vague terms and gave no indication that the parties believed that it met all legal requirements. In summary, the court found that *Morrow v. Shotwell* simply did not apply to the facts of this case.⁸ The court stated that "the rule of *Morrow v. Shotwell* will apply only where there is a misdescription, not a failure of identification."⁹

*Garner v. Redeaux*¹⁰ presented an unusual set of facts. Redeaux originally sued for specific performance on a written contract for the sale of land. The only writing evidencing the sale was a statement on the back of the Redeaux check. That writing failed to set forth terms of payment or fully to describe the property.¹¹ The court expressed further concern that the writing failed to specify clearly whether the conveyance was in fee or was merely a lease.¹² The court of appeals held that the writing satisfied the Statute of Frauds,¹³ theorizing that the wife's signature and husband's later acceptance of payment ratified the writing.¹⁴ The court found that the absence of the terms of payment did not invalidate the sufficiency of the writing.¹⁵ The court also inferred that the language of the writing more clearly expressed a promise to convey land rather than to lease it.¹⁶

Finally, the absence of an adequate property description failed to deter the court from upholding specific performance.¹⁷ Though the trial court took judicial notice that Highland Home Addition, the property tract in question, is in Harris County, Texas, the court of appeals rejected the use of judicial notice in the context of interpreting the property description because the location of the disputed tract was not a matter of common knowledge in the community.¹⁸ Despite its rejection of judicial notice, the court took an extremely liberal view and allowed extrinsic evidence to establish that the property description in the writing applied to a specific tract of land in Harris County, Texas.¹⁹ The sellers also argued that the agreement could not be enforced by specific performance because the writing failed to include all of

7. *Id.*

8. *Id.*

9. 680 S.W.2d at 520.

10. 678 S.W.2d 124, 124 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

11. See *supra* note 2 for writing requirements of the Statute of Frauds.

12. The writing on the Redeaux's check appeared as follows: "9-6-78, From Mr. & Mrs. Garner, Lot tract land, tract 66-Block 3, Highland Home Addition, pd this account two thousand dollars & Bal Four Thousand in payment." *Id.* at 126. Evalyn Garner, wife of appellant, signed the writing. *Id.* at 125-26.

13. See *supra*, note 2 (statute requires a writing and signature for real estate contracts).

14. 678 S.W.2d at 126.

15. *Id.*, citing *Botello v. Miesener-Collins Co.*, 469 S.W.2d 793, 794 (Tex. 1971) (a writing does not require a statement of terms of payment or consideration to satisfy the Statute of Frauds).

16. 678 S.W.2d at 126.

17. *Id.* at 128.

18. *Id.* at 127, citing *Osborne v. Moore*, 112 Tex. 361, 247 S.W. 498, 499 (1923); see *Harper v. Killion*, 345 S.W.2d 309, 311 (Tex. Civ. App.—Texarkana 1961, no writ).

19. 678 S.W.2d at 127.

the essential terms. The court found that contention unpersuasive and stated that specific performance is an appropriate remedy if the agreement appears complete, though the writing may not.²⁰ An agreement established through writing and supplemented by testimony is all that is necessary for specific performance.²¹ In support of its conclusion the court applied the "mere skeleton" exception to the parole evidence rule, which applies if the document, though not complete, is a mere skeleton of a more complete agreement of the parties.²²

The Statutes of Frauds prevented an oral modification of a contract to convey land in *King v. Texacally Joint Venture*.²³ King sued the Texacally Joint Venture for specific performance of a contract to purchase raw land executed on June 20, 1983. The contract required King to deposit an irrevocable letter of credit in the amount of \$50,000.00 "forthwith." King deposited instead a cashier's check on June 28, after the seller orally named June 27 as the absolute deadline. The trial court denied specific performance, finding that the parties orally modified the contract when they made June 27 the absolute deadline, and King had therefore breached the contract.²⁴

King argued in the higher court that because the oral agreement materially modified the written agreement, it was not enforceable under the Statute of Frauds.²⁵ The court of appeals held that the oral agreement constituted a material modification of the contract, making the contract unenforceable under the Statute of Frauds.²⁶ The court also held that King fully performed her obligations under the written contract by depositing a cashier's check eight days after the execution of the contract.²⁷ The court found that "forthwith" indicated performance within a reasonable time, not immediately.²⁸

*Builders Sand Inc. v. Turtur*²⁹ also involved timeliness in the context of a contract to convey. The purchaser sued for specific performance although he earlier had informed the seller that he could not close on the date mentioned in the contract. The court denied the purchaser's claim for specific performance holding that the purchaser's actions amounted to an anticipatory repudiation, relieving the seller of all obligations under the contract.³⁰ Moreover, the contract called for payment in cash and the purchaser tendered checks, which may or may not have been drawn on sufficient funds.

20. *Id.* at 127, 128; see *Miller v. Hodges*, 260 S.W. 168, 170 (Tex. Comm'n App. 1924, judgment adopted) (location and description of land ascertainable by methods other than detailed writing).

21. 678 S.W.2d at 128.

22. *Id.* at 128; see 2 C. MCCORMICK & R. RAY, TEXAS LAW OF EVIDENCE § 1611 (2d ed. 1956).

23. 690 S.W.2d 618, 620 (Tex. App.—Austin 1985, writ ref'd n.r.e.).

24. *Id.* at 619.

25. *Id.*; see also *supra* note 2 (requirements of Statute of Frauds).

26. 690 S.W.2d at 620.

27. *Id.*

28. *Id.*; see *Billingsley v. Mossler Acceptance Co.*, 119 S.W.2d 196, 199 (Tex. Civ. App.—El Paso 1938, no writ).

29. 678 S.W.2d 115, 117-18 (Tex. App.—Houston [14th Dist.] 1984, no writ).

30. *Id.* at 120.

The court held that a check is not sufficient when the contract specifically called for cash.³¹ Hence, the court found that the purchaser was not ready, willing and able to perform.³²

A case from the Dallas court of appeals also addressed the question of whether a party is ready, willing and able to perform. In *Various Opportunities, Inc. v. Sullivan Investments, Inc.*³³ the seller, Various Opportunities, Inc., contracted with the purchaser, Sullivan Investments, Inc., for the sale of 32 acres at \$10,000 per acre. The parties twice extended the contract with the purchaser paying extension fees. When the seller refused performance, the purchaser brought suit for specific performance. The seller contended that the terms of the contract were indefinite and, hence, unenforceable. The questionable terms involved covenants by the seller to "pay the costs and expenses necessary to provide for 236 dwelling units, water and sanitary sewer services acceptable to and approved by the City of Grand Prairie. . . ."³⁴ The court ordered specific performance of the contract even though some terms were to be fixed in the future.³⁵ The court ruled that the terms were sufficiently definite.³⁶

B. Usury

Two cases from the courts of appeals dealt with issues of usury in real estate transactions. In *Bray v. McNeely*³⁷ Bray decided to invest with McNeely who was in the real estate business. In August, 1978, Bray entered into an arrangement with McNeely that involved a 6.5 acre tract in Pasadena, Texas. The agreement called for Bray to buy a one-half interest for \$50,000 with an option to require McNeely to purchase Bray's one-half interest in the property at a price of \$55,000 if McNeely could not sell the property by October 15, 1978. McNeely failed to sell the property by the specified date, and Bray, exercising his option, demanded payment of the \$55,000, which McNeely refused. In the trial court the jury returned issues finding that the transaction involved an investment rather than a loan, and a purchase by McNeely of Bray's investment at a profit to Bray.³⁸ The trial

31. *Id.* at 121; *see also* *Moore v. Copeland*, 478 S.W.2d 573, 577 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.) (check is insufficient payment unless payee consents).

32. *Turtur*, 678 S.W.2d at 121.

33. 677 S.W.2d 115, 116-17 (Tex. App.—Dallas 1984, no writ).

34. *Id.*

35. *Id.* at 117.

36. The contract of sale sufficiently identifies the seller, the purchaser, the property, the escrow agent and duties thereof, and the purchase price per acre. The contract and amendments, which are definitely incorporated into the judgment, provide a specific means for resolving any future disputes as to the cost of installing the utilities. This is in the nature of third party arbitration which left nothing discretionary to be accomplished or determined by either the seller or purchaser. It has been held that in the event terms of future performance are definitely set forth and not left to future negotiation between the parties, specific performance of the contract can be accomplished.

Id. at 117-118; *see* *Pacific Mut. Life Ins. Co. v. Westglen Park, Inc.*, 314 S.W.2d 425, 428 (Tex. Civ. App.—Texarkana 1958), *rev'd on other grounds*, 160 Tex. 1, 325 S.W.2d 113, 117 (1959).

37. 682 S.W.2d 615, 616 (Tex. App.—Houston [1st Dist.] 1984, no writ).

38. *Id.* at 617.

court, nonetheless, granted a judgment *non obstante veredicto*,³⁹ finding as a matter of law that the transaction involved a usurious loan.⁴⁰

On appeal the court addressed the elements necessary for usury to exist. Those elements include: "(1) a loan of money; (2) an absolute obligation that the principal be repaid, and (3) the exaction of a greater compensation than allowed by law for the use of money by the borrower."⁴¹ Contingent payments, the court observed, are not necessarily usurious.⁴² Here, no absolute obligation to repay existed, and accordingly one of the necessary elements of a loan transaction failed.⁴³ The documents indicated that the parties intended a sale of property, not a loan. McNeely had no absolute obligation to pay Bray \$55,000 or any other amount. Unless McNeely failed to sell the land and Bray exercised his option, McNeely owed nothing to Bray. Thus, payment contingent on the sale of land or the exercise of an option does not constitute a usurious loan.⁴⁴

*Tygett v. University Gardens Homeowners' Association*⁴⁵ involved the legality of a five-dollar per day late fee charged by a condominium homeowners association. The condominium owner's normal monthly assessment was \$228.48. Tygett, the owner and appellant, fell approximately seventy-nine days behind in his payments. He eventually paid the principal amount of the assessments, but disputed the late charges. The homeowners association sued Tygett to collect the late fee. Tygett counterclaimed, contending that the late charges constituted a usurious rate of interest,⁴⁶ and requested appropriate statutory damages.⁴⁷

The court addressed whether or not the late charges were in fact interest charges. The court defined interest as a charge for the "use or forbearance or detention" of money.⁴⁸ For the above definition to apply, however, a lending relationship must have existed between Tygett and the Homeowners Association.⁴⁹ Both the trial and appellate courts found no lending relationship and thus no interest charge.⁵⁰

Tygett relied upon *Dixon v. Brooks*,⁵¹ which held that the definition of interest does include late charges.⁵² The court of appeals, nonetheless, held

39. *Id.* at 616.

40. *Id.*

41. *Id.* (quoting *Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982); *see also Stedman v. Georgetown Savings & Loan Ass'n*, 595 S.W.2d 486, 489 (Tex. 1979) (to apply usury laws the lender must overcharge for the use, detention, or forbearance of the lender's money).

42. 682 S.W.2d at 619.

43. *Id.*

44. *Id.*

45. 687 S.W.2d 481, 482 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

46. *Id.*

47. TEX. REV. CIV. STAT. ANN. art. 5069-1.06 (Vernon Pam. Supp. 1986) provides that a party found to have charged usurious rates is liable for three times the amount of interest the parties originally agreed to.

48. 687 S.W.2d at 483; *see Stedman v. Georgetown Savings & Loan Ass'n*, 595 S.W.2d 486, 489 (Tex. 1979).

49. 687 S.W.2d at 483.

50. *Id.*

51. 604 S.W.2d 330, 334 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.).

52. *Id.*

that the *Dixon* court had decided that case in the context of a promissory note and an established lending relationship, whereas in many cases, such as *Tygrett*, no usury exists if the late charges are assessed outside of a lending relationship.⁵³

II. REAL ESTATE AGENTS AND BROKERS

A. Liability of Agents and Brokers

In *Wilson v. Donze*⁵⁴ the Fort Worth court of appeals reaffirmed that a broker is obliged to act in the best interest of the party for whom the property is sold.⁵⁵ In *Donze*, Wilson, a broker, solicited the Donzes, the sellers, for the sale of their property. When the Donzes told Wilson that they did not use brokers, Wilson told them that he could obtain his fee from the buyer if he sold the property and that he knew some people who might be interested. The Donzes agreed and told Wilson they wanted \$85,000 for the property. Wilson drew up a contract with Ken-Car Investment, Inc. as buyer. In fact, Wilson and his wife owned Ken-Car. Another broker, Powers, paid the \$1,000 escrow called for in the Donze/Ken-Car contract. Powers knew that a couple named Bullard was looking for a similar property. He told the Bullards that the Donzes wanted \$10,000 an acre. The Bullards offered \$100,000 for the property. Later, Powers told the Bullards that the Donzes rejected the \$100,000 offer and wanted \$115,000. The Bullards then authorized Powers to make an offer for \$115,000. They then received a contract for the sale of the property with Wilson, trustee, as seller. Sometime later, the Donzes called Wilson and advised him they wanted no less than \$10,000 an acre, but at that point the contract had already been signed. Subsequent to closing, the Bullards received a corrective deed retaining minerals in the names of Wilson and Powers. Mrs. Bullard called Mrs. Donze and Mrs. Donze found out for the first time that the Bullards had paid \$115,000 for the property, though she received only \$85,000. The Donzes sued and the trial court awarded judgment against Wilson finding \$24,900 actual and \$35,000 exemplary damages.⁵⁶ On appeal, the court held that Wilson, acting as broker for the Donzes, had a fiduciary duty to obtain the best possible price for them.⁵⁷ Moreover, Wilson's failure to disclose that he purchased the land for his own anticipated profit constituted a willful and malicious

53. 687 S.W.2d at 484; see *Schepps Grocery Co. v. Burroughs Corp.*, 635 S.W.2d 606, 610 (Tex. App.—Houston [14th Dist.] 1982, no writ) (lending relationship does not exist in context of lease relationship); *Apparel Mfg. Co. v. Vantage Properties, Inc.*, 597 S.W.2d 447, 448-49 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.); *Rimco Enter., Inc. v. Texas Elec. Serv. Co.*, 599 S.W.2d 362, 366 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.) (late charge for utility billings not considered interest); *Southwest Park Outpatient Surgery, Ltd. v. Chandler Leasing Div.*, 572 S.W.2d 53, 55-56 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ); *Maloney v. Andres*, 483 S.W.2d 703, 705 (Tex. Civ. App.—Eastland 1972, writ ref'd n.r.e.).

54. 692 S.W.2d 734, 736 (Tex. App.—Fort Worth 1985, no writ).

55. *Id.*; see *Riley v. Powell*, 665 S.W.2d 578, 580 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.); *Burleson v. Earnest*, 153 S.W.2d 869, 874 (Tex. Civ. App.—Amarillo 1941, writ ref'd w.o.m.).

56. 692 S.W.2d at 786.

57. *Id.* at 739.

breach of that fiduciary duty.⁵⁸ Due to the willful and malicious nature of the breach the court upheld the award of exemplary damages.⁵⁹ Even in the absence of an agreement to pay a commission, Wilson had a fiduciary duty and that duty required him to obtain the best possible price for the seller even if the seller has set a lower price.⁶⁰

The court also held that a fiduciary duty existed regardless of the fact that no commission agreement existed between Wilson, the broker, and his principal, the Donzes.⁶¹ A commission agreement is not a pre-requisite for an owner/broker relationship.⁶² Wilson's agreement with the Donzes that he could collect his commission from the buyer if the Donzes allowed him to list their property satisfactorily created the owner/broker relationship, and required that Wilson disclose that he planned to make a profit.⁶³

B. Action for Brokerage Commissions

The court of appeals in *Brice v. Eastin*⁶⁴ strictly applied the Statute of Frauds provision of the Real Estate License Act⁶⁵ to real estate commissions.⁶⁶ Eastin informed Brice, the broker, that Eastin had a ranch for sale. Brice testified that Eastin agreed to a five percent commission over the telephone. Eastin denied any such agreement. In direct negotiations with the buyer, Eastin reduced the five percent figure that Brice proposed and included in the contract two and one-half percent, the other two and one-half percent going to Eastin's lawyer. Eastin paid the two and one-half percent commission, and Brice sued for the other two and one-half. The trial court ordered a directed verdict against Brice on the basis of the Statute of Frauds, holding that part performance does not bring a contract for a brokerage commission outside the Statute of Frauds.⁶⁷ The court of appeals affirmed⁶⁸ stating that the doctrine of partial performance applies only to general real estate contracts.⁶⁹ A writing is required of all agreements to pay real estate commissions or the court will not enforce the agreement.⁷⁰ No writing in support of the five percent agreement existed. Therefore, the court could not enforce it.

58. *Id.* at 739-40.

59. *Id.*

60. *Id.* at 739.

61. *Id.*

62. *Id.*; see *Anderson v. Griffith*, 501 S.W.2d 695 (Tex. Civ. App.—Fort Worth 1973, writ ref'd n.r.e.).

63. *Id.* at 739, citing *Riley v. Powell*, 665 S.W.2d 578, 580 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.) (buyer must obtain best price available for seller).

64. 691 S.W.2d 54, 54 (Tex. App.—San Antonio 1985, no writ).

65. TEX. REV. CIV. STAT. ANN. art. 6573a (Vernon Supp. 1986).

66. Section 20(b) of the Real Estate License Act prohibits actions for real estate commissions unless the commission agreement is in writing and is signed by the person to be charged. *Id.* art. 6573a, § 20(b).

67. 691 S.W.2d at 56.

68. *Id.* at 57.

69. *Id.*

70. *Id.*

In *Jauregui v. Jones*,⁷¹ another court of appeals held that by failing to object at trial a party may waive the requirement that only a licensed broker may recover in an action for a brokerage commission.⁷² In *Jauregui* a broker entered into an exclusive listing agreement with the owner of a bakery for the sale of the bakery property. Robert D. Jones, assignee of the listing agreement wrote on the face of the agreement, "sales commission to be paid by buyer."⁷³ Jones contended that he procured a purchaser, that the purchaser bought the property and took possession, but subsequently returned the property to the seller because of an inability to obtain Small Business Administration financing. Jones sued for his commission but failed to allege in his petition that he was a licensed broker.⁷⁴ The defendant failed to object to that fact at trial, and the lower court ruled that the defendant waived the objection. The court of appeals agreed and concurred with the trial court's opinion that the contract contained ambiguous terms since it contained a printed-form "seller shall pay" provision with a handwritten "buyer shall pay" over-printing.⁷⁵ The jury found that the parties intended that the bakery owner pay. The court found ample evidence to support the jury finding and affirmed.⁷⁶

*Arthur P. Gale Realtors v. Belisle*⁷⁷ also involved licensing defenses and the Statute of Frauds. Gale Realtors was a partnership composed of Arthur Gale and his mother. Each partner held a broker's license, but the partnership itself held none. The seller, Belisle, called Arthur Gale for assistance in selling a condominium. The parties did not enter into a written agreement. The condominium manager referred a possible purchaser, Buckingham, to the Belisles who in turn referred her to Gale. Gale secured a written contract for the purchase of the condominium for \$66,500.00 and a six percent brokerage fee. The Belisles changed the amount to \$67,100.00 and signed the contract. Mr. Belisle then returned the contract to Buckingham who wanted to think the terms over. The Belisles later told Gale Realtors that they were not going to sell, and the realtors dropped the matter. Only twenty-four days later, the Belisles sold the property to Buckingham for \$66,500.00. Gale Realtors sued to recover commissions on the sale amounting to six percent of the purchase price. The court of appeals reversed a summary judgment for the seller.⁷⁸ The court held that a partnership may recover for brokerage services under the Real Estate License Act even though the Act contains no provision regarding qualifications for a broker-

71. 695 S.W.2d 258, 258 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.).

72. Section 20(a) of the Real Estate License Act prohibits a person from bringing suit for compensation owed in conjunction with that person acting as a real estate agent; see TEX. REV. CIV. STAT. ANN. art. 6573a, §§ 2, 4 (Vernon Supp. 1986), if that person did not have a valid real estate broker's or salesman's license at the time the acts were performed. *Id.* § 20(a). TEX. R. CIV. P. 90 provides that unless specifically objected to at trial, all defects or omissions are waived.

73. 695 S.W.2d at 260.

74. See TEX. REV. CIV. STAT. ANN. art. 6573a, § 20(a) (Vernon Supp. 1986).

75. 695 S.W.2d at 262.

76. *Id.* at 264.

77. 694 S.W.2d 195, 196 (Tex. App.—Dallas 1985, no writ).

78. *Id.* at 198.

age license for a partnership.⁷⁹ If the person actually rendering the brokerage services is a licensed broker the partnership may maintain an action for commissions.⁸⁰ As a last point, the court found that the language in the proposed written contract of sale, which the seller actually signed, was sufficient to charge the seller with the promise to pay six percent brokerage fee.⁸¹ Accordingly, the requirements of Section 20(b)⁸² were satisfied.

The broker also prevailed in *Morgan v. Letellier*⁸³ in which a buyer and a seller entered into a contract for the sale of thirty acres of land. The contract entitled the broker to a six percent real estate commission. Furthermore, both parties agreed to pay one-half of the commission upon final consummation. After closing, conducted without the broker's knowledge, the broker learned that the buyer planned to pay the commission with a promissory note rather than in the manner prescribed in the contract. The broker sued and recovered.⁸⁴ Unless the broker consents, a modification of the contract with respect to the broker's rights to commission is invalid.⁸⁵ This is true even if the modification only postpones the closing date or changes payment terms or the amount of consideration.⁸⁶

In *Webb v. Eledge*⁸⁷ the broker was less fortunate. In *Webb* a landowner entered into an exclusive listing agreement with a broker agreeing to pay a brokerage fee of six percent of the sales price when the broker sold, contracted to sell, or exchanged the property or any portion of it. During the term of the brokerage listing agreement the owner entered into a build-to-suit lease for a total rental of \$270,000. The broker claimed he had produced the lease and was entitled to his commission. The owner claimed that the legal description of the listed property was insufficient, thus voiding the contract.

On appeal, the court held for the owner and found that the Texas Real Estate License Act⁸⁸ prevented recovery absent a proper property description. Furthermore, the buyer and seller's intention or knowledge with re-

79. TEX. REV. CIV. STAT. ANN. art. 6573a, § 1(b) (Vernon Supp. 1986) makes it unlawful for a "person" to in any way act as a real estate agent or salesman without a license. Section 2 of the Act defines person to include a partnership. *Id.* at § 2(5). Section 6 of the Act, however, which states qualifications needed for licenses under the Act contains no provision pertaining to partnerships. Licensing requirements in both corporations and individuals are provided. *Id.* at § 6. The lack of qualification guidelines seemed to persuade the court that in some instances an unlicensed partnership could maintain an action for commissions earned on a real estate transaction. *Gale Realtors*, 694 S.W.2d at 198.

80. 694 S.W.2d at 198.

81. *Id.*

82. TEX. REV. CIV. STAT. ANN. art. 6573a, § 20(b) (Vernon Supp. 1986) requires that some writing must exist of the commission's agreement before a court will enforce an agreement to pay commissions.

83. 677 S.W.2d 165, 166 (Tex. App.—Houston [1st Dist.] 1984, no writ).

84. *Id.*

85. *Id.* at 167; see also *Pierce v. Pois*, 15 S.W.2d 1072, 1073-74 (Tex. Civ. App.—Amarillo 1929, no writ).

86. 677 S.W.2d at 167.

87. 678 S.W.2d 259, 259 (Tex. App.—Amarillo 1984, no writ).

88. *Id.* at 262; TEX. REV. CIV. STAT. ANN. art. 6573(a), § 20(b) (Vernon Supp. 1986). See *supra* notes 66, 82 for provisions of § 20(b) of the Real Estate License Act.

spect to a certain tract of property does not validate an otherwise ambiguous property description, stated the court.⁸⁹ Because the owner owned other property in the vicinity of the disputed tract, the court feared that substantiating the property description would subvert the purpose of the Act.⁹⁰

In *Marlin v. Kelly*⁹¹ the decedent named a real estate broker in his will. The will provided that the broker possessed the right to collect a commission from the sale of any property that passed to the decedent's wife.⁹² The court treated the broker as a conditional beneficiary of the decedent's will and stated that his interest in the estate was a charge upon the property the decedent devised to his wife,⁹³ not affecting the wife's ability to encumber or dispose of the property.⁹⁴

A federal court applying Texas law reversed a judgment against the broker in another action for a real estate commission.⁹⁵ In *Hoyt R. Matisse Co. v. Zurn*⁹⁶ a deal fell apart prior to closing. The broker sued the seller, Zurn, for commissions based on a contract of sale signed by Zurn and the broker on behalf of the purchaser. The broker, however, failed to establish that the buyer authorized her to sign the contract for him, and the district court denied recovery of the commission. The court of appeals found that point unpersuasive. The subsequent course of dealing convinced the court that the buyer authorized the broker to sign the contract.⁹⁷ The court also considered whether the purchaser ever accepted the contract insofar as the seller had made numerous counteroffers.⁹⁸ The court found that a valid contract existed. The court also allowed the broker to obtain a commission even though the parties never closed the sale.⁹⁹ A broker earns his commission once he procures a purchaser ready, willing and able to buy, regardless of whether the sale ever closes.¹⁰⁰ The broker has no right to a commission only if the sale does not close and the contract specifically states that the broker's commission is contingent upon closing, or if the broker is responsible for the sale not closing.¹⁰¹ In *Zurn* the court found an enforceable contract, and found that the broker was entitled to recover a commission.¹⁰²

89. 678 S.W.2d at 263; see *Morrow v. Shotwell*, 477 S.W.2d 538, 540 (Tex. 1972); see also *Matney v. Odom*, 147 Tex. 26, 210 S.W.2d 980, 984 (1948) (listing agreement not validated by parties' acknowledgement of description of property).

90. 678 S.W.2d at 262-63.

91. 678 S.W.2d 582, 585 (Tex. App.—Houston [14th Dist.] 1984, writ granted).

92. The will read as follows: "Bill Marlin is to be the exclusive real estate agent (6% commission) for the sale by my wife of any of the r/e passing to her hereunder and shall have a right against the sales proceeds to her to collect that commission." *Id.* at 586.

93. *Id.* at 587.

94. *Id.*

95. *Hoyt R. Matisse Co. v. Zurn*, 754 F.2d 560, 562 (5th Cir. 1985).

96. *Id.*

97. *Id.* at 564-65.

98. *Id.* at 565-66.

99. *Id.* at 566-67.

100. *Id.* at 566, citing *Leonard Duckworth, Inc. v. Michael L. Field & Co.*, 516 F.2d 952, 958 (5th Cir. 1975).

101. 754 F.2d at 566, citing *Henry v. Schweitzer*, 435 S.W.2d 941, 943-44 (Tex. Civ. App.—San Antonio 1968, writ ref'd n.r.e.).

102. 754 F.2d at 567.

III. WARRANTY AND DECEPTIVE TRADE PRACTICES ACT

In *First Texas Savings Association v. Stiff Properties*,¹⁰³ the court found the defendant lender liable under the Texas Deceptive Trade Practices Act¹⁰⁴ (DTPA) for failing to provide financing instruments in time for a closing.¹⁰⁵ The plaintiff partnership was formed for the purpose of purchasing a beach-front condominium. It entered into an earnest money contract calling for a July 1, 1982 closing. The partnership paid the lender, First Texas Savings Association, an application charge of \$160.00. The savings association through a variety of circumstances failed to have the necessary financing papers available to the purchasers in time for closing, and the partnership lost the opportunity to purchase the condominium. The partnership sued under the DTPA, and the savings association defended on grounds that the partnership did not meet the Act's definition of a consumer.¹⁰⁶ The court, however, relied on a case decided while *First Texas* was pending in which the Texas Supreme Court held that a borrower is a consumer under the DTPA if his main objective is to lease or purchase goods or services.¹⁰⁷ Since the borrower's main objective was the purchase of condominiums the transaction fell under the DTPA. Thus, the court held that the savings association committed an unconscionable act when it failed to prepare the financing papers on time.¹⁰⁸

In *Jim Walter Homes, Inc. v. Gonzalez*¹⁰⁹ the measure of damages occupied most of the court's opinion. The court held that the appropriate measure of damages in a suit against a homebuilder for a damaged structure equals the cost of repairs if repairs are feasible and do not involve economic waste.¹¹⁰ Damages in cases in which repairs are not feasible amount to the difference in the value of the structure if built without defects and the value of the structure with the defects.¹¹¹ The distinction is one between substantial compliance and insubstantial compliance.¹¹² The remedial measure of damages is applicable only when the contractor is in substantial compliance with the contract.¹¹³ The diminution in value measure of damages requested by the contractor only applies if he has not substantially complied with the contract.¹¹⁴

In *Barclay v. Johnson*¹¹⁵ a court of appeals found individual officer liability because an officer of the corporate homebuilder knowingly participated in

103. 685 S.W.2d 703, 703 (Tex. App.—Corpus Christi 1984, no writ).

104. TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon Pam. Supp. 1986) [hereinafter referred to as DTPA].

105. 685 S.W.2d 705-706.

106. *Id.*; see TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Pam. Supp. 1986).

107. *La Sara Grain Co. v. First Nat'l Bank*, 673 S.W.2d 558, 567 (Tex. 1984).

108. *First Texas*, 685 S.W.2d at 706.

109. 686 S.W.2d 715, 717 (Tex. App.—San Antonio 1985, no writ).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*; see *Turner, Collie & Bradon, Inc. v. Brookhollow, Inc.*, 642 S.W.2d 160, 164 (Tex. 1982).

114. 686 S.W.2d at 717; *Turner*, 642 S.W.2d at 164.

115. 686 S.W.2d 334, 334 (Tex. App.—Houston [1st Dist.] 1985, no writ).

misrepresentations concerning the status of his company. The court held that a corporate officer risks individual liability if he knowingly participates in a fraudulent or tortious act, even though the act is performed for the benefit of the corporation.¹¹⁶ The officer in *Barclay* had represented that the corporation was a bonded and registered builder as well as a member of the Greater Houston Builder's Association, though none of those representations was true.

*De Los Santos v. Alamo Lumber Co.*¹¹⁷ involved a suit brought by a homeowner against a homebuilder claiming the builder breached both expressed and implied warranties. The buyer's expert had testified that the foundation had settled due to the failure of the builder to properly compact the fill dirt that half of the house sat upon.¹¹⁸ The jury found for the homeowners, but the court entered a judgment notwithstanding the verdict.¹¹⁹ The trial court found little evidence to support the homeowner's claims that Alamo Lumber Co. breached the implied warranty to construct the house in a good and workmanlike manner.¹²⁰

IV. TITLE AND CONVEYANCE

A. *Deeds and Title Generally*

Southern Resources Corp. v. Kincaid,¹²¹ involved an allegation that a scrivener erroneously recorded a land deed. The heirs and assignees of W.H. Williams sued the assignees and the heirs of W.L. Williams in an action to remove a cloud upon W.H. Williams heirs' and assignees' title. After reviewing the evidence, the court found no evidence whatsoever that the scrivener made an error, and found that the trial court should have granted an instructed verdict in favor of the heirs and assignees of the grantee of record.¹²²

Henderson v. Henderson also involved an alleged scrivener's error.¹²³ John C. Henderson sued his brother, Robert Henderson, seeking to have the court declare an error in a deed to land. John C. claimed that, through an error in transcription, the deed named John G. Henderson, the father of the plaintiff, as grantee, rather than John C. Henderson. The plaintiff argued that his father transferred the land to him as a gift. Alternatively, the plaintiff argued that the running of the statute of limitations entitled him to a declaration of title. The plaintiff's brother, Robert C. Henderson urged a four-year statute of limitations as a bar to his brother's action. He also argued that the court should not reform the deed because no evidence pointed

116. *Id.* at 336; see *Kinkler v. Jurica*, 84 Tex. 116, 19 S.W. 359, 360-61 (1892); *Seale v. Baker*, 70 Tex. 283, 7 S.W. 742, 745-46 (1888); *Wagner v. Morris*, 658 S.W.2d 230, 233-34 (Tex. App.—Houston [1st Dist.] 1983, no writ).

117. 683 S.W.2d 48, 48 (Tex. App.—San Antonio 1984, no writ).

118. *Id.* at 51.

119. *Id.* at 50.

120. *Id.* at 51-52.

121. 688 S.W.2d 672, 673-74 (Tex. App.—Eastland 1985, no writ).

122. *Id.* at 675.

123. 694 S.W.2d 31, 33 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.).

to a mutual mistake between the parties. The court of appeals found substantial evidence that the scrivener erred when recording the deed.¹²⁴ The court further held that a suit for reformation of a deed is covered by a four-year statute of limitations.¹²⁵ The statute does not begin to run, however, until the defect is discovered or should have been discovered if the complaining party had exercised reasonable diligence.¹²⁶

A federal court of appeals chastised the parties for unnecessarily complicating a simple case in *Perry v. Stewart Title Co.*¹²⁷ The Perrys bought a \$70,000 house, but soon after learning that their driveway and garage encroached upon a utility easement, they sought to rescind the purchase. The defendants eventually secured a release of liability for the encroachment from the utility company for \$100.00. The court held that the doctrine of merger prevented the Perrys from relying on provisions in the earnest money contract that allowed them to rescind the contract based upon objections to title.¹²⁸ Additionally, the court found no basis for rescision based on mutual mistake, as the alleged mistake went to a collateral rather than a material fact.¹²⁹ In finding the mistake went to a collateral fact, the court noted how easily the parties in fact dealt with the encroachment problem.¹³⁰ The measure of damages in this type of case equals the difference between the property's value with the defect and without the defect, or alternatively, the cost to remedy the defect.¹³¹ Because the homeowners limited the evidence only to the cost of having the purchase rescinded, and produced no evidence as to damages, they recovered nothing.¹³²

In *Zephyr v. Zephyr*¹³³ a man and a woman sued each other to determine their respective interests in a piece of property. They both claimed title to a house under a deed naming them as co-grantees.¹³⁴ The court held that if a deed has more than one grantee, each having an unspecified interest, the presumption is that each grantee possesses the right to an undivided interest equal to those of the other grantees.¹³⁵ This presumption is rebuttable if the plaintiff proves that all the grantees contributed unequally in consideration for the interest.¹³⁶

124. *Id.* at 36.

125. *Id.* at 31; *Brown v. Harvard*, 593 S.W.2d 939, 944 (Tex. 1980).

126. 694 S.W.2d at 36; *see Brown v. Harvard*, 593 S.W.2d 939, 944 (Tex. 1980); *Sullivan v. Barnett*, 471 S.W.2d 39, 46-47 (Tex. 1971); *McClung v. Lawrence*, 430 S.W.2d 179, 181-82 (Tex. 1968).

127. 756 F.2d 1197, 1197-98 (5th Cir. 1985).

128. *Id.* at 1204-1206.

129. *Id.*

130. The court observed that the parties spent a half million dollars on attorney fees. *Id.* at 1211.

131. *Id.* at 1206.

132. *Id.*

133. 679 S.W.2d 553, 555 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

134. *Id.* The woman claimed to be the common law wife of the husband, but did not sustain her burden of establishing that fact at trial. *Id.* at 555.

135. *Id.* at 556.

136. *Id.* at 556-57, citing *Wooley v. West*, 391 S.W.2d 157, 159 (Tex. Civ. App.—Tyler 1965, writ ref'd n.r.e.); *Bray v. Clark*, 9 S.W.2d 203, 205 (Tex. Civ. App.—Waco 1928, writ dismiss'd).

In *Kennesaw Life & Accident Co. v. Goss*,¹³⁷ the court held that one cannot use an action for declaratory judgment to create new remedies or to change the substantive law. A grantor who disclaims any interest in property cannot be made a defendant under the Uniform Declaratory Judgment Act¹³⁸ since he is not in possession within the meaning of the trespass to try title statutes.¹³⁹

The rule against perpetuities appeared only once during the Survey period.¹⁴⁰ That case, *Maupin v. Dunn*,¹⁴¹ involved the court's interpretation of an option purporting to bind the optionor and optionee and the heirs, successors, and assigns of each.¹⁴² The optionor conveyed the property in question to the plaintiff and plaintiff then wished to convey to one Cobb. Cobb, however, would not accept the property without a release of the option. The optionee refused to release. The plaintiff sued to remove a cloud on his title. The court found that the option created a cloud upon the title and violated the rule against perpetuities. The provision violated the rule because it gave a right to a present interest in the property that may not arise until after the legal time limit of the rule.¹⁴³

B. Adverse Possession

Adverse possession questions came before the higher courts only twice during the Survey period.¹⁴⁴ In *Bywaters v. Gannon*¹⁴⁵ the appellants purchased a lot in 1936 and constructed a home upon it in 1941. At the time they acquired the lot, a small hedge near the private property line already existed. Many years later, in 1955, the Bywaters purchased the adjoining lot. When the Bywaters purchased that lot, the hedge had grown almost seven feet wide, substantially overhanging the property line. In 1980 the Bywaters decided to erect a fence on the property line. To build the fence the Bywaters cleared a substantial area of hedge growth. The Gannons brought suit for trespass claiming they held title to the area covered by the hedge by adverse possession.¹⁴⁶ The trial court rendered judgment for the Bywaters.¹⁴⁷ When the Gannons appealed, the Bywaters were late in filing their brief. The court of appeals limited itself to facts contained in the brief submitted by the Gannons¹⁴⁸ and reversed. The supreme court held that the

137. 694 S.W.2d 115, 116 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

138. TEX. REV. CIV. STAT. ANN. art. 2524-1 (Vernon 1965), *repealed by* Act of June 16, 1985, ch. 959, § 9(1), 1985 Tex. Sess. Law Serv. 7043, 7218 (Vernon).

139. TEX. PROP. CODE ANN. § 22.001-.045 (Vernon 1984).

140. *Maupin v. Dunn*, 678 S.W.2d 180, 181 (Tex. App.—Waco 1984, no writ).

141. *Id.*

142. The conveyance read as follows: "This option shall be binding on Optionor, his heirs, successors, and assigns, and shall inure to the benefit of Optionee his heirs, successors, and assigns." *Id.* at 82-83.

143. *Id.*

144. *Bywaters v. Gannon*, 686 S.W.2d 593, 593 (Tex. 1985); *Stafford v. Jackson*, 687 S.W.2d 784, 784 (Tex. App.—Houston [14th Dist.] 1985, no writ).

145. 686 S.W.2d at 594.

146. *Id.*

147. *Id.*

148. *Id.*; see TEX. R. CIV. P. 419 (court has discretion in hearing statement of facts).

facts failed to support a finding of adverse possession, and reversed the court of appeals.¹⁴⁹ The only evidence supporting adverse possession was that the Gannons had always claimed the property and had maintained, clipped, preserved, watered, and nurtured it. The supreme court held that mere maintenance of the hedge did not give adequate notice that the Gannons were in hostile and adverse possession of the land.¹⁵⁰

In *Stafford v. Jackson*¹⁵¹ the appellee sought title by right of adverse possession to a tract of land that he had maintained, grazed cattle upon, and enclosed. The record owners contended that the claimant's use of the land failed to constitute hostile or adverse possession.¹⁵² They relied upon the general rule that an adverse claimant can rely on grazing as evidence of adverse possession only when he shows that he intentionally enclosed the land for grazing purposes.¹⁵³ The claimant adequately proved that he used the land for more than casual grazing and that he designedly, as opposed to incidentally or accidentally, enclosed the land.¹⁵⁴ The court, convinced that the claimant had satisfied all requirements for adversely obtaining title to a specific tract,¹⁵⁵ accordingly held for the claimant.¹⁵⁶

C. Fair Market Value

The supreme court in *Porras v. Craig*¹⁵⁷ announced a significant modification of the rules relating to the valuation of property for the purpose of damage suits. The defendant mistakenly bulldozed the plaintiff's land, including a standing fence. The difference between the land's fair market value immediately before the trespass and afterwards is the usual measure of damages.¹⁵⁸ In determining market value, a property owner is usually allowed to testify as to the property's value.¹⁵⁹ The owner, however, must direct his opinion testimony to the property's fair market value only.¹⁶⁰ Asking the witness if he is familiar with the market value of his property usually satisfies

149. 686 S.W.2d at 595.

150. *Id.* The court stated that "[s]ince mowing the grass and planting flowers does not constitute a hostile character of possession sufficient to give notice of an exclusive adverse possession, it stands to reason that maintaining a hedge does not either." *Id.*; see *Miller v. Fitzpatrick*, 418 S.W.2d 884, 890 (Tex. Civ. App.—Corpus Christi 1967, writ ref'd n.r.e.); *Surkey v. Qua*, 173 S.W.2d 230, 232 (Tex. Civ. App.—San Antonio 1943, writ dism'd w.o.j.).

151. 687 S.W.2d 784, 784 (Tex. App.—Houston [14th Dist.] 1985, no writ).

152. *Id.* at 787.

153. *McDonnold v. Weinacht*, 465 S.W.2d 136, 142 (Tex. 1971); *Jamail v. Gene Naumann Real Estate*, 680 S.W.2d 621, 626 (Tex. App.—Austin 1984, writ ref'd n.r.e.).

154. 687 S.W.2d at 787-88.

155. The claimant must demonstrate that he knows exactly where the property is located to obtain title by adverse possession. *Id.* at 786; see *Thompson v. Texas Commerce Bank*, 586 S.W.2d 138, 141 (Tex. Civ. App.—Houston [1st Dist.] 1979, writ ref'd n.r.e.).

156. 687 S.W.2d at 788.

157. 675 S.W.2d 503, 503 (Tex. 1984).

158. *Id.* at 504; *Cummer-Graham Co. v. Maddox*, 155 Tex. 284, 285 S.W.2d 932, 935-36 (1956).

159. 675 S.W.2d at 504; see *State v. Carpenter*, 126 Tex. 604, 89 S.W.2d 194, 201 (1936); *State v. Berger*, 430 S.W.2d 557, 559 (Tex. Civ. App.—Waco 1968, writ ref'd n.r.e.); see also 2 R. RAY, TEXAS PRACTICE § 1422 (3d ed. 1980) (owner can testify regarding his own property value but not someone else's).

160. 675 S.W.2d at 505.

this requirement. The court held that the owner's testimony did not reflect the true market value, but simply reflected an estimation of personal value of the property.¹⁶¹ Accordingly the supreme court found no evidence of a reduction in fair market value of the property, and reversed the court of appeals and the trial court which had awarded the owner title to the land, \$7,000 in actual damages and \$50,000 in exemplary damages based on reduction in market value.¹⁶² The court, faced with the ultimate disposition of the case, held that substantial evidence showed that the plaintiff had been injured.¹⁶³ The plaintiff's inability to show any reduction in market value severely hampered any chance of recovery. One of the defendant's expert witnesses testified that removal of the trees actually increased the market value of the property rather than causing it to decrease.¹⁶⁴ In cases where injury to the landowner by the wrongful trespass of another is established, however, courts may award damages for the intangible value of the property destroyed.¹⁶⁵ Accordingly, the court remanded the case to allow the plaintiff an opportunity to prove damages for the intangible loss of the trees.¹⁶⁶

D. Boundaries

1. *Taxation.* The Supreme Court of Texas in *Oake v. Collin County*¹⁶⁷ affirmed a judgment of the district court favoring a property owner, reversing the court of appeals which had found for the county taxing authority.¹⁶⁸ Oake sued several Collin County taxing authorities claiming that the boundary line between Collin and Dallas Counties could not be discerned on his property. He sought a declaratory judgment to that effect and an injunction from the assessment and collection of taxes on his property until the counties determined the boundary.¹⁶⁹ The trial court rendered summary judgment in favor of Oake, but the court of appeals reversed,¹⁷⁰ ruling the landowner shoulders the burden of showing that no taxes are due and owing from him.¹⁷¹ The court of appeals stated further that the burden includes locating the true boundary line.¹⁷² The supreme court disagreed and reversed.¹⁷³ The court stated that a taxing entity bears the burden of showing that it is

161. *Id.*

162. *Id.* at 505-506.

163. The bulldozer razed much of plaintiff's property, including a number of large trees and a fence. *Id.* at 504.

164. *Id.* at 506.

165. *Id.*; see *Miloszar v. Gonzalez*, 619 S.W.2d 283, 285 (Tex. Civ. App.—Corpus Christi 1981, no writ); *Hamilton v. Fant*, 422 S.W.2d 495, 498-99 (Tex. Civ. App.—Austin 1967, no writ); *Moran Corp. v. Murray*, 381 S.W.2d 324, 328 (Tex. Civ. App.—Texarkana 1964, no writ); *Lucas v. Morrison*, 286 S.W.2d 190, 191 (Tex. Civ. App.—San Antonio 1956, no writ).

166. 675 S.W.2d at 506.

167. 692 S.W.2d 454, 454 (Tex. 1985).

168. *Id.*

169. *Id.* at 454-55.

170. *Plano Indep. School Dist. v. Oake*, 682 S.W.2d 359, 364 (Tex. App.—Dallas 1984), *rev'd*, 692 S.W.2d 454 (Tex. 1985).

171. *Id.* at 364.

172. *Id.*

173. 692 S.W.2d at 456.

entitled to property taxes.¹⁷⁴ The entity may establish its entitlement if it shows that the disputed property falls within the taxing entity's authority.¹⁷⁵ A valid property assessment creates a burden in the entity's favor,¹⁷⁶ but in the instant case, Oake rebutted that presumption when the County failed to locate its boundary.¹⁷⁷ Because an individual has no authority to determine boundary lines, the County bears that burden also.¹⁷⁸

2. *Boundary disputes.* In *Van Zandt v. Holmes*,¹⁷⁹ the Waco court of appeals set forth the rule for distinguishing between boundary disputes and ordinary trespass to try title actions. If the boundary question is the reason for the suit the action is a boundary suit though title may be disputed.¹⁸⁰ The distinction is noteworthy since in a boundary suit the plaintiff does not have to prove superior title whereas the opposite is true in a trespass to try title action.¹⁸¹

E. *Innocent Purchaser for Value*

The Fort Worth court of appeals reversed a judgment awarding title to a claimant, an alleged innocent purchaser for value, in *Raposa v. Johnson*.¹⁸² The plaintiff apparently purchased his interest in the property from the husband during the pendency of a divorce proceeding. The court found that he was therefore a subsequent purchaser.¹⁸³ No evidence showed, however, that the purchaser paid valuable consideration for the property, and therefore the trial court's judgment in favor of the purchaser was in error.¹⁸⁴ Deed recitals alone do not prove the subsequent purchaser paid valuable consideration.¹⁸⁵ On a related point, the court held that the subsequent grantee had the burden of establishing that he was an innocent purchaser.¹⁸⁶

F. *Fixtures*

In a case peculiar by its procedural irregularity, the supreme court held that a railway tank car used to create a culvert is a fixture as a matter of

174. *Id.*

175. *Id.*; cf. *Nacogdoches Indep. School Dist. v. McKinney*, 504 S.W.2d 832, 837 (Tex. 1974) (city must show property situs to collect taxes).

176. Cf. *Nolan v. San Antonio Ranch Co.*, 81 Tex. 315, 16 S.W. 1064, 1065 (1891) (property is taxed in county where it is located).

177. 692 S.W.2d at 455.

178. *Id.*

179. 689 S.W.2d 259, 259 (Tex. App.—Waco 1985, no writ).

180. *Id.* at 262-63; see *Plumb v. Stuessy*, 617 S.W.2d 667 (Tex. 1981).

181. 689 S.W.2d at 262.

182. 693 S.W.2d 43, 44 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.).

183. *Id.* at 47. A subsequent purchaser for value is not bound by a conveyance of the property if he has notice. TEX. PROP. CODE ANN. § 13.001(a) (Vernon 1984). A subsequent purchaser who takes without paying valuable consideration is bound by a conveyance regardless of notice. *Id.* § 13.001(b).

184. 693 S.W.2d at 47.

185. *Id.*; *Davidson v. Ryle*, 103 Tex. 209, 124 S.W. 616, 619-20 (1910); *Fenley v. Ogletree*, 277 S.W.2d 135, 144 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e.).

186. 693 S.W.2d at 46-47.

law.¹⁸⁷ In an otherwise unremarkable opinion, the supreme court in *Logan v. Mullis* enumerated the three factors that demonstrate a conversion of personality to realty: "(1) the mode and sufficiency of annexation, either real or constructive; (2) the adaption of the article to the use or purpose of the realty; and (3) the intention of the party who annexed the chattel to the realty."¹⁸⁸

V. EASEMENTS

The Survey period produced a number of cases involving easements. In *Lindner v. Hill*,¹⁸⁹ the Texas Supreme Court found an implied dedication of a road to the public. In 1889 the plaintiff's predecessors in title built a public school upon their property, and built Lindner Road to get to the property. The plaintiff's predecessor allowed the public to use the road at will until 1982. The court noted that dedication is a question of fact, and reiterated the essential elements of an implied dedication from its opinion in *Las Vegas Pecan & Cattle Co. v. Zavala County*,¹⁹⁰ also decided during the Survey period. The elements included "(1) The acts of the landowner induced the belief that the landowner intended to dedicate the road to public use; (2) [the landowner] was competent to do so; (3) the public relied on these acts and will be served by the dedication; and (4) there was an offer and acceptance of the dedication."¹⁹¹ The court uses considerable legerdemain in satisfying the last three elements, using much the same evidence that tended to establish the first element. The court noted that article 6812h,¹⁹² which eliminated the common law doctrine of implied dedication, applied prospectively only.¹⁹³ In the *Las Vegas Pecan*¹⁹⁴ case, decided six months earlier, the court similarly allowed proof of the first element to predominate, while paying lip service to the four-element test to which the court continues ostensibly to adhere.

In *Sisco v. Hereford*¹⁹⁵ Hereford sued for a declaratory judgment regarding the existence of an implied easement across two tracts of lands. An earlier court had established an easement in favor of the Hereford's predecessor in title across the Varal Pasture, and the Herefords claimed they were entitled to one across the La Copa Pasture as well.¹⁹⁶ The evidence showed that the easement had not been used since the early 1960's and that the roadway had deteriorated. Chevron Oil Company had put in a road across Sisco's land that substantially followed the old easement. The Herefords argued

187. *Logan v. Mullis*, 686 S.W.2d 605, 609 (Tex. 1985) (Kilgarlin, J., dissenting). The court decided the case on an issue not briefed by any party or before any court in this cause. *Id.*

188. *Id.* at 607.

189. 691 S.W.2d 590, 591-92 (Tex. 1985).

190. 682 S.W.2d 254, 256 (Tex. 1984).

191. 682 S.W.2d at 256.

192. TEX. REV. CIV. STAT. ANN. art. 6812h, § 1 (Vernon Supp. 1986).

193. *Lindner*, 691 S.W.2d at 592; *Las Vegas Pecan*, 682 S.W.2d at 256.

194. *Las Vegas Pecan*, 682 S.W.2d at 256-57.

195. 694 S.W.2d 3, 5 (Tex. App.—San Antonio 1984, no writ).

196. *Id.*

that the old easement should be relocated to the Chevron Road. Sisco argued abandonment of the old easement claiming that the Herefords had an easement of ingress and egress on an adjacent roadway. The court found that a change in the established easement required the consent of the parties¹⁹⁷ or a court of equity's finding that justice and fairness required a change in the roadway.¹⁹⁸ There was no evidence that justice and fairness required a change so none was allowed.¹⁹⁹

The question in *McWhorter v. City of Jacksonville*²⁰⁰ concerned whether an easement reserved in the grantor created an easement appurtenant or an easement in gross. An easement appurtenant would pass to subsequent grantees, while an easement in gross is personal to the original grantee of the easement, and is not transferable or assignable.²⁰¹ The court observed that an easement in gross is less favored and never presumed if the court can fairly construe it as appurtenant or attached to some other estate.²⁰² The court defined an easement appurtenant as the existence of dominant and a servient estate, together with a negative easement precluding the owner of the servient estate from interfering with the right of the owner of the dominant estate to use the servient estate.²⁰³ The court found that the reservation in the grantor created an easement appurtenant and passed by conveyance.²⁰⁴

VI. CONDOMINIUM REGIMES

In the only reported opinion treating questions applicable to condominiums alone, the Dallas court of appeals reversed a summary judgment entered in favor of lessees expelled from a condominium for violating bylaws prohibiting residents under the age of sixteen from residing in the condominium.²⁰⁵ In *Preston Tower Condominium Associates v. S.B. Realty, Inc.*²⁰⁶ a couple and their daughter, who was under sixteen, rented a condominium unit from the unit's owners. The condominium bylaws prohibited persons under the age of sixteen from permanent residency. The Association notified the lessees of the violation, and the tenant applied to the Association for a special exception, which the association denied.²⁰⁷ The Association filed suit to enjoin the lessees from violating the bylaws. The lessees defended, alleging that the prohibition deprived them of due process and equal protection provided under the fourteenth amendment to the U.S.

197. *Id.* at 8.

198. *Id.*

199. *Id.*

200. 694 S.W.2d 182, 183 (Tex. App.—Tyler 1985, no writ).

201. *See Drye v. Eagle Rock Ranch, Inc.*, 364 S.W.2d 196, 203 (Tex. 1962).

202. 694 S.W.2d at 7; *Ginther v. Bammel*, 336 S.W.2d 759, 763 (Tex. Civ. App.—Waco 1960, no writ).

203. 694 S.W.2d at 184.

204. *Id.*

205. *Preston Tower Condominium Ass'n v. S.B. Realty, Inc.*, 685 S.W.2d 98, 100 (Tex. App.—Dallas 1985, no writ).

206. *Id.*

207. *Id.* at 100.

Constitution.²⁰⁸

The court of appeals canvassed foreign jurisdictions and found that other courts have held that age restrictions on real estate ownership or occupation are constitutional unless the restrictions are unreasonable or are arbitrarily applied.²⁰⁹

VII. RESTRICTIONS ON THE USE OF LAND

A. Restrictive Covenants

A substantial number of cases during the Survey period involved restrictive covenants on the use of land. The Supreme Court of Texas dealt with the subject in *Sharpstown Civic Association, Inc. v. Pickett*.²¹⁰ Ronald Pickett, the defendant, proposed to construct a commercial car wash on land he owned. Pickett had purchased the land from Robert Hill who had bought the land as two adjacent lots in 1969. Hill moved a small one-story structure onto Lot 1 and used it as an office. This use continued until 1979 when Hill sold both lots to Pickett. At the time of suit Pickett operated a used car lot on Lot 1. When Pickett gave notice that he intended to use the two lots together as a commercial car wash, the Sharpstown Civic Association and resident landowners sought an injunction against Pickett based on certain deed restrictions applicable to the subdivision.²¹¹ The trial court denied injunctive relief based upon jury findings that Sharpstown waived its right to enforce the deed restrictions by acquiescing in the nonresidential use of Lot 1, that Lots 1 and 2 were maintained and operated as a single parcel, and that therefore the Association and the six landowners had waived their right to complain of a nonresidential use of Lot 2 as well.²¹² The supreme court reversed.²¹³ The residents' failure to bring an earlier suit constituted a waiver of their right to complain about the prior use of the lots.²¹⁴ The waiver, however, would carry over to the new use of the lots only if the old use and the new use were substantially the same.²¹⁵ Here, the court found that a car wash differed significantly from the prior use of the property.²¹⁶

208. U.S. CONST. amend. XIV.

209. *Preston Tower*, 685 S.W.2d at 102-103; see *White Egret Condominium, Inc. v. Franklin*, 379 So. 2d 346, 351-52 (Fla. 1979) ("The law is now clear that a restriction on individual rights on the basis of age need not pass the 'strict scrutiny' test, and therefore age is not a suspect classification. . . . We do recognize, however, that these age restrictions cannot be used to unreasonably or arbitrarily restrict certain classes of individuals from obtaining desirable housing. Whenever an age restriction is attacked on due process or equal protection grounds, we find the test is: (1) whether the restriction under the particular circumstances of the case is reasonable, and (2) whether it is discriminatory, arbitrary, or oppressive in its application.") 685 S.W.2d at 102-03; see *Riley v. Stoves*, 22 Ariz. App. 223, 526 P.2d 747, 751-53 (Ariz. Ct. App. 1974).

210. 679 S.W.2d 956, 957 (Tex. 1984).

211. The deed restrictions prohibited nonresidential use of the disputed property. *Id.* at 957-58.

212. *Id.* at 957.

213. *Id.* at 958-59.

214. *Id.* at 958.

215. *Id.*

216. *Id.*

The ruling prevented Pickett from using Lot 2 for any nonresidential purpose and from using Lot 1 for any nonresidential purpose except for those purposes Pickett had used the lots for prior to the suit.²¹⁷

The courts of appeal also addressed "residential only" covenants. In *Cole v. Cummings*²¹⁸ the owners of a certain lot wanted to build a road through the lot to connect their subdivision with a tract of land that they owned on the other side. Other landowners in the subdivision sued to enforce the restrictive covenant that required the land "be used generally for residential purposes only."²¹⁹ The court found an exception to the rule that the plaintiffs must demonstrate irreparable harm before the court will issue injunctive relief.²²⁰ A landowner who seeks to enjoin violation of a covenant restricting the land to residential use need show only that the proposed activity would be a substantial breach of the covenant.²²¹ The court found that the cut-through would be for business and not residential purposes.²²² Thus, the court prohibited the cut-through.²²³

An unusual case on its facts and one not altogether clear in its reasoning is *Jordan v. Telles*,²²⁴ in which the use restrictions were contained not in the deed, but in the contract of sale. The contract provided that the purchaser could not use the property for commercial purposes.²²⁵ Further, any breach triggered a penalty equal to fifty percent of the purchase price.²²⁶ The purchaser was later arrested and convicted of selling heroin. The evidence showed that the sale occurred in the home subject to the contractual restriction. The sellers demanded the 50% premium within ten days, and when the purchaser failed to pay, filed suit for the amount.²²⁷ The court, however, found that the primary purpose of the clause was not totally to prohibit commercial activity, but rather to provide an incentive to the purchaser to use the property for residential purposes.²²⁸ The court found it persuasive that the defendants were indeed occupying the house for residential use.²²⁹ Additionally, one sales transaction does not turn a residence into a place of commercial activity.²³⁰

*Winn v. Ridgewood Development Co.*²³¹ is the last case during the Survey period involving a residential use restriction. The appellants, Mr. and Mrs. Dunaway, purchased Lots 3 and 4 in the Ridgewood Addition in Fort Worth and Mrs. Dunaway's parents bought Lots 1 and 2 adjoining the Dun-

217. *Id.*

218. 691 S.W.2d 11, 12 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.).

219. *Id.* at 14.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 14-15.

224. 678 S.W.2d 113, 114 (Tex. App.—El Paso 1984, no writ).

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 115.

231. 691 S.W.2d 832, 833 (Tex. App.—Fort Worth 1985, no writ).

away's lots. Mrs. Dunaway's parents, the Winns, never built a home on the property and at all times resided out of town. In 1983, the Winns gave permission to the Dunaways to build a treehouse on Lot 2 for the Dunaway children. The developer sued seeking a permanent injunction requiring the removal of the treehouse, and succeeded in the trial court.²³²

The appellate court found that the jury's answers to special issues conflicted.²³³ In answering Special Issue No. 2 the jury found that the treehouse violated the provisions requiring that the lots be used for private residence only.²³⁴ The court found the issue broad and ambiguous and that it should not have been submitted.²³⁵ The jury's answer conflicted with other special issues answered in the Dunaway's favor, in which the jury found the treehouse both appurtenant and pertinent to the Dunaway's residence as well as not contrasting with the surrounding lots. Applying the familiar rule that specific findings control over ambiguous or general findings, the court disregarded the ambiguous finding to resolve the conflict.²³⁶ The jury resolved all other issues in favor of the Dunaways. The court thus held that a treehouse is a proper use of a lot that is restricted to residential use.²³⁷ The restrictive term "residential purposes" means any use other than a commercial one.²³⁸ Because no commercial activity took place in the treehouse, it fit the description of residential use and was a proper use of the lot.²³⁹

When faced with the same generic restriction against nonresidential use, the court of appeals in *Mills v. Kubena*²⁴⁰ ruled that operation of a day-care center violated deed restrictions forbidding use of property for other than residential purposes.²⁴¹ The defendants largely conceded that the activity constituted prohibited activity in violation of a residential subdivision restriction. The more significant questions on appeal involved the defense of substantial compliance. The nonconforming homeowners tendered an issue to the court which placed the burden of establishing a substantial violation upon the complaining landowners. The court, consistent with its earlier opinion in *Townplace Homeowners' Association, Inc. v. McMahon*,²⁴² held that the issue was a defensive one, and that the burden rests upon the nonconforming homeowner to persuade the jury that any violation was not substantial.²⁴³

The court also affirmed the trial court's entry of judgment notwithstanding the verdict on the issue of waiver.²⁴⁴ The trial court instructed the jury

232. *Id.*

233. *Id.* at 834-35.

234. *Id.* at 833-34.

235. *Id.* at 834-35.

236. *Id.*

237. *Id.* at 835.

238. *Id.*

239. *Id.*; see *MacDonald v. Painter*, 441 S.W.2d 179, 182 (Tex. 1969).

240. 685 S.W.2d 395, 396 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).

241. *Id.* at 397.

242. 594 S.W.2d 172, 175 (Tex. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

243. 685 S.W.2d at 398.

244. *Id.* at 399. 685 S.W.2d at 399.

that to find a waiver of a restriction prohibiting use of subdivision lots for other than residential purposes, the person in breach of the covenant must produce evidence showing other activities nonresidential in nature taking place on the restricted land that would convince a reasonable man that the covenants were waived.²⁴⁵ The number, nature and severity of any prior nonresidential use violations, and whether the restrictions had been enforced previously should be considered in answering this issue.²⁴⁶ A final point to be considered is whether any benefit still inures from the covenant.²⁴⁷ The instruction further required evidence that the pre-existing nonresidential violation were material and adversely affected all of the lots.²⁴⁸ Finally, the court instructed the jury that the other landowners had to know of other violations to effectuate a waiver.²⁴⁹ The court found no evidence that the landowners knew of other alleged violations in the subdivision, and therefore affirmed the trial court in disregarding the jury's answer on the issue of waiver.²⁵⁰

A court of appeals used the fraudulent conveyance statute²⁵¹ to enforce a deed restriction against a homeowner who conveyed his property to a Cayman Island corporation just before trial.²⁵² In *Radney v. Clear Lake Forest Community Association, Inc.*,²⁵³ owners of a one-story home wanted to add a second story over the garage. They obtained a permit and began construction. A homeowners association, Clear Lake Community Forest Association, sued to enjoin the construction.²⁵⁴ Deed restrictions governing their property restricted the height of garage structures to the height of the house or, alternatively, to the number of stories.²⁵⁵ The defendant's conveyed the property to a third party before trial, and the plaintiffs amended their suit to include an action for fraudulent conveyance.²⁵⁶

The court found the deed restriction valid,²⁵⁷ and sustained the restriction as a matter of law. The court also found no obstacle to employing an action for fraudulent conveyance as well.²⁵⁸ The homeowners argued that an action in fraud could not stand because the owners conveyed homestead property which is exempt from an attack by creditors.²⁵⁹ Creatively, however, the court found that article 24.02 of the Business and Commerce Code allows an interested person to bring an action for fraudulent conveyance.

245. *Id.* at 398.

246. *Id.* at 398-99.

247. *Id.* at 399.

248. *Id.*

249. *Id.*

250. *Id.*

251. TEX. BUS. & COM. CODE ANN. art. 24.02 (Vernon 1968).

252. *Radney v. Clear Lake Forest Community Ass'n*, 681 S.W.2d 191, 193 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 194.

257. *Id.* at 195.

258. *Id.* at 199.

259. *Id.* at 197; see *Chandler v. Welborn*, 156 Tex. 312, 294 S.W.2d 801, 805-806 (1956).

Since the complaining landowners were interested persons and not creditors, the general rule that creditors may not attack a conveyance of exempt property as fraudulent does not apply.²⁶⁰ This strict reading of the fraudulent conveyance statute is in harmony with the generally favorable and broad interpretation given to residential subdivision restrictions.

The court took express note that the Radneys spent a substantial amount of money on garage construction and that the court's order would require removal of the nonconforming structure.²⁶¹ The court noted that its affirmation of the trial court would cause the defendants great expense in conforming with the deed restriction.²⁶² Expense from the enforcement of deed restriction, however, hardly necessitates waiver of enforcement.²⁶³

*Delaporte v. Preston Square, Inc.*²⁶⁴ noted that the failure to object to insubstantial or trivial violations of deed restrictions does not necessarily constitute waiver of adjoining landowners' rights to enforce the same restriction against a more substantial violation. In that case the homeowners association sued a homeowner to obtain an order to compel him to remove additions to his home which the Association claimed were in violation of his deed restrictions.²⁶⁵ The dispute centered around the fact that the association had previously approved minor additions to the defendant's home without objection. The defendant claimed that the association's waiver of the restriction in the earlier instances constituted an across the board waiver of improvements. The court, unimpressed with the defendant's argument, held that the previous additions were trivial in nature, and that failure to object to those additions did not prohibit the association's future enforcement of more substantial violation of the deed restrictions.²⁶⁶

B. Zoning

The Dallas court of appeals addressed a zoning question involving commercial bingo in *City of Mesquite v. Coltharp*.²⁶⁷ The city of Mesquite sought to enjoin a fraternal lodge from running a commercial bingo business in a part of the city zoned exclusively for retail purposes.²⁶⁸ The trial court held that the lodge did not violate the zoning ordinance because commercial bingo is not "indoor commercial recreation" which was limited by city ordinance to areas zoned commercial or light commercial.²⁶⁹ The court of appeals disagreed. The court construed the section to mean all commercial indoor recreation or amusement in all indoor facilities, thus including bingo

260. *Id.* at 197.

261. *Id.* at 198.

262. *Id.*

263. *Id.* at 198; *Gunnels v. North Woodland Hills Community Ass'n*, 563 S.W.2d 334, 338 (Tex. Civ. App.—Houston [1st Dist.] 1978, no writ).

264. 680 S.W.2d 561, 563 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

265. *Id.*

266. *Id.* at 565; see *Fowler v. Brown*, 535 S.W.2d 46, 47 (Tex. Civ. App.—Waco 1976, no writ).

267. 685 S.W.2d 78, 80 (Tex. App.—Dallas 1984, writ ref'd n.r.e.).

268. *Id.*

269. *Id.* at 81.

operations.²⁷⁰ The court also rejected the lodge's argument that since similar organizations were allowed to conduct meetings in general retail districts, they should be entitled to conduct bingo in general retail districts as an incidental secondary activity of the lodge. The court of appeals found no evidence to support the trial court's finding that commercial bingo is a secondary or incidental activity to the general activities of the lodge.²⁷¹ The lodge conducted commercial bingo games three nights a week for four hours, and that indicated that the lodge operated a bingo game as its primary activity.²⁷²

Legislative and judicial activity during the Survey period focused on the issue of residential group homes for the disabled.²⁷³ In *Collins v. City of El Campo*²⁷⁴ the plaintiff city and subdivision owners joined with nonsubdivision owners to enjoin the operation of a group home on the grounds that such operation violated the city's zoning ordinance and also violated deed restrictions applicable to the property.²⁷⁵ The trial court found for the plaintiff and the court of appeals reversed.²⁷⁶

The Advisory Board of the El Campo Area Adult Center for the Developmentally Disabled, Inc., was used as a group home for four mentally retarded men. The court found that four unrelated retarded men lived in the home along with two supervising houseparents. The four men and the house parents functioned as a single housekeeping unit.²⁷⁷ The court placed great emphasis upon the fact that the home sought to replicate a normal family unit for the four mentally retarded men, involving preparation of meals, household chores, shopping, and the like.²⁷⁸ The court of appeals looked to the definition of family in the zoning ordinance and found that it contained no requirement that parties occupying a dwelling and living as a single housekeeping unit be related by blood or marriage.²⁷⁹ The court also found that while the home was called a group home, it is not the same as a boarding house, lodging house or hotel, all of which are prohibited by the ordinance in the single-family residential district.²⁸⁰ Accordingly, the four unrelated men living together with the house parents met the zoning ordinance's definition of family.²⁸¹ Turning to the restrictive covenants limiting the use of the property for residential purposes only, the court found that the group used the home for residential purposes only and that the dwelling conformed to the zoning ordinance in that it was a single-family dwelling.²⁸²

270. *Id.*

271. *Id.* at 81-82.

272. *Id.*

273. See *infra* notes 399-404 and accompanying text.

274. 684 S.W.2d 756, 758 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

275. *Id.*

276. *Id.* at 762.

277. *Id.* at 759.

278. *Id.* at 758.

279. *Id.* at 759.

280. *Id.* at 760 n.1.

281. *Id.* at 760.

282. *Id.* at 761. The result of the case is consistent with the new enactment discussed *infra* notes 399-404 and accompanying text.

VII. EMINENT DOMAIN, ANNEXATION AND SOVEREIGN IMMUNITY

A. Condemnation

The Supreme Court of Texas decided one case during the Survey period involving questions of eminent domain.²⁸³ In *City of Round Rock v. Smith*²⁸⁴ the appellee, Smith, and other subdivision homeowners sued the city for flood damages to their homes.²⁸⁵ The city had approved the filling in of a natural water course so that adjacent lots could be developed. During a storm, severe flooding occurred, allegedly as a result of the filling of the water course, causing damage and loss of life. The plaintiff's claimed that the city negligently approved the filling of the water course and, alternatively, that the city's approval constituted a governmental taking of property without reasonable compensation.²⁸⁶

The city claimed governmental immunity to the negligence claim, and the court agreed.²⁸⁷ A city is liable for negligence only if the tort is committed by city employees performing proprietary, not governmental, duties.²⁸⁸ Immunity is conferred if the tort is committed by employees performing duties that only a city as a governmental entity can perform.²⁸⁹ The approval of a plat may only be performed by a city using its discretionary power²⁹⁰ in a governmental, not proprietary sense.²⁹¹ Thus, the court granted immunity from the negligence claim.²⁹²

The supreme court easily disposed of the homeowners arguments that the plat approval constituted an inverse condemnation of their property.²⁹³ The Texas Constitution provides that, "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, *unless by the consent of such person.*"²⁹⁴ Since the petition alleged that the developer owned the tracts at the time that the plat approval was requested, the consent of the owner, namely, the developer, was obtained prior to any taking. The homeowners could not, therefore, claim an inverse condemnation as they took title through one who consented to the governmental taking, if indeed there had been one.²⁹⁵

The El Paso court of appeals in *City of Odessa v. Meek*²⁹⁶ noted an important limitation on evidence admissible to prove the value of land in condemnation proceedings. The City had filed condemnation proceedings and the only issue was that of compensation. In determining the amount of compen-

283. *City of Round Rock v. Smith*, 687 S.W.2d 300, 301 (Tex. 1985).

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* at 302.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 303.

292. *Id.*

293. *Id.*

294. TEX. CONST. art. I, § 17 (emphasis supplied by court).

295. 687 S.W.2d at 303.

296. 695 S.W.2d 775, 776 (Tex. App.—El Paso 1985, no writ).

sation the trial court heard evidence pertaining to the value of land surrounding the condemned property. The court of appeals reversed, holding that because the surrounding lots were improved lots, their value could not be used to determine the value of an unimproved condemned lot.²⁹⁷ The trial court accordingly erred in permitting testimony as to sales of improved property, at least on direct examination.²⁹⁸

The court ordered a new trial in a series of prolonged condemnation cases in *United States v. 8.41 Acres of Land*.²⁹⁹ The condemnation commission had based a condemnation award on comparable sales of pipeline easements, relying on the trial court's finding that the condemned tract had been effectively severed from the parent tract.³⁰⁰ The district court had instructed the commissioners that comparable sales were the best method of valuation. The condemnation commission apparently construed this to mean "comparable sales of pipeline easements."³⁰¹ Although the federal district judge found that the government indeed condemned a pipeline easement, the court held that the commission had erred in making an unjustified finding that the taken tracts were severed.³⁰² The court pointed out that the problem with the Commission's method was that the government ended up paying a fraction of the price a private purchaser would have paid under similar circumstances.³⁰³

Accordingly, the crucial issue becomes the value of the parent tract after the taking.³⁰⁴ The landowners had offered comparable pipeline easement sales only, rather than comparable values of tracts burdened with easements.³⁰⁵

A court of appeals in Houston affirmed a condemnation award after reforming it to assess costs against the condemnor.³⁰⁶ In *Anderson v. Clahon Gas Company*,³⁰⁷ the landowners appealed from a condemnation judgment awarding them \$3,211.60 as damages, and awarding the appellees an easement across their land. The landowners alleged that they did not receive statutory notice.³⁰⁸ The court found that the condemnor bears the burden of establishing strict compliance with the notice provisions of article 3264.³⁰⁹ Nonetheless, the landowners' failure to object to the defects at trial consti-

297. *Id.* at 776.

298. *Id.* at 777; see *State v. Chavers*, 454 S.W.2d 395, 397-98 (Tex. 1970).

299. 595 F. Supp. 731, 732 (E.D. Tex. 1984).

300. *Id.*

301. *Id.*

302. *Id.* at 733.

303. *Id.* at 732.

304. *Id.* at 733.

305. *Id.*

306. *Anderson v. Clason Gas Co.*, 677 S.W.2d 702, 703 (Tex. App.—Houston [1st Dist.] 1984, no writ).

307. *Id.*

308. *Id.* The statute requires that each party receive notice in writing. Additionally, a return must be filed describing how the person serving notice performed his duties. Eminent Domain Proceedings—Award Decisions Act, ch. 105, § 1, 1961 Tex. Gen. Laws 203, 203-204, repealed by Act of June 19, 1983, ch. 576, § 6, 1983 Tex. Gen. Laws 3729, 3729.

309. *Id.* at 704.

tuted a waiver of notice,³¹⁰ and the court held for the appellees.³¹¹

The court disposed of appellant's claim that the gas company arbitrarily exercised eminent domain by referring to article 1436 of the Texas Statutes. That provision requires no showing of necessity when exercising eminent domain.³¹² The court held that an acquisition of a right-of-way for future use is not an arbitrary or capricious action.³¹³

The landowners also complained that the gas company failed to negotiate in good faith.³¹⁴ The court held that a condemnor is not required to negotiate if such attempts appear futile.³¹⁵ The evidence was sufficiently established that such was the case. As a final point, the court reformed the judgment to eliminate the award of costs against the landowner.³¹⁶ Under article 3267, the court may not authorize costs against the landowner if the amount of damages the commissioners and the trial court awarded is more than the condemnor offered before the suit.³¹⁷

In *Matador Pipelines of Texas, Inc. v. Martin*³¹⁸ another court rejected what it termed "a rule of hyper-technicality"³¹⁹ in the law of eminent domain. The trial court granted a motion for directed verdict against the condemnation plaintiff on the ground that notice to the landowner was defective since the server failed to return service.³²⁰ The landowner, however, admitted that he had received a copy of the notice. The court, unpersuaded by other technical objections, which it viewed as part and parcel of an attempt to read the notice requirements of condemnation proceedings too literally and strictly,³²¹ reversed.³²²

B. Annexation

In *Larkins v. City of Denison*³²³ landowners sued the city to declare an ordinance and the city's proposed annexation under authority of the ordinance void. The landowners claimed that the city lacked sufficient resources to provide essential services to the landowners.³²⁴ The court of appeals affirmed the trial court's entry of summary judgment against the landowners.³²⁵ The power to lay municipal boundaries is reserved, with

310. *Id.* at 704, citing *PGP Gas Prods. v. Fariss*, 620 S.W.2d 559, 560 (Tex. 1981).

311. 677 S.W.2d at 706.

312. *Id.* at 704-705; TEX. REV. CIV. STAT. ANN. art. 1436 (Vernon 1980).

313. *Id.* at 705.

314. *Id.*

315. *Id.* at 706, citing *Houston North Shore Ry. Co. v. Tyrell*, 128 Tex. 248, 98 S.W.2d 786, 795 (1936).

316. 677 S.W.2d at 706.

317. See TEX. PROP. CODE ANN. § 21.047 (Vernon 1984) (formerly at TEX. REV. CIV. STAT. ANN. art. 3267 (Vernon 1968), repealed by Act of June 13, 1983, ch. 105, § 6, 1983 Tex. Gen. Laws 3729, 3729).

318. 684 S.W.2d 165, 166 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

319. *Id.* at 168.

320. *Id.* at 166-67; see *supra* note 308 for notice requirements.

321. *Id.* at 168.

322. *Id.*

323. 683 S.W.2d 754, 755 (Tex. App.—Dallas 1984, no writ).

324. *Id.*; see TEX. REV. CIV. STAT. ANN. art. 970a (Vernon 1963 & Pam. Supp. 1986).

325. 683 S.W.2d at 757.

limitations,³²⁶ in the political entity, not the judiciary.³²⁷ The limitations apply to the location of the proposed annexation and not to the purposes of the annexation.³²⁸ Thus an annexation ordinance's validity may not be challenged in the judiciary if improper purpose is the ground for the charge.³²⁹ The court also held that section 10(F) of article 970a provides the exclusive remedy for the failure of a municipality to meet the service requirements of that article.³³⁰ That section provides that a majority of the qualified voters of the annexed area must file for a petition of disannexation.³³¹ Where a statute provides a particular remedy, the court should be wary of reading into it other remedies which negate the protections for competing interests which the legislature considered when shaping the remedies.³³²

C. Sovereign Immunity

In *Cornelius v. Armstrong*³³³ the court of appeals held that a plaintiff's trespass to try title suit against the State should allege sufficient jurisdictional facts evidencing a showing that the State consents to the suit.³³⁴ The court also held that the plaintiff must produce legislative authority authorizing the suit.³³⁵ On the substantive merits of the trespass to try title action, the court affirmed the take nothing judgment rendered against the plaintiff in his suit against the individual nongovernmental defendants.³³⁶ The court stated that a plaintiff may recover in a trespass to try title suit if he: "(1) proves a regular chain of conveyances from the sovereign, (2) proves a superior title out of a common source of title or (3) proves title under an appropriate statute or (4) proves prior possession which has not been abandoned."³³⁷

Apparently, the Land Commissioner of Texas in 1938 had determined that the acres the plaintiff claimed were vacant and not previously titled by the State.³³⁸ The plaintiff attempted to prove he had succeeded to title in the land through a chain of transfers beginning with the State of Texas. The plaintiff failed in all respects to prove title.³³⁹ In fact, the plaintiff never proved that the State ever transferred the title to the property.³⁴⁰

IX. RIVERS AND STREAMS

In the only case decided during the survey period involving waters and

326. See TEX. REV. CIV. STAT. ANN. art. 970a, § 7 (Vernon Pam. Supp. 1986).

327. 683 S.W.2d at 756.

328. *Id.*

329. *Id.*

330. *Id.*; see TEX. REV. CIV. STAT. ANN. art. 970a, § 10(f) (Vernon Pam. Supp. 1986).

331. *Id.* § 10(B)(2)(F).

332. *Id.* at 757.

333. 695 S.W.2d 48, 49 (Tex. App.—Tyler 1985, no writ).

334. *Id.* at 49-50.

335. *Id.* at 50.

336. *Id.* at 51.

337. *Id.* at 50.

338. *Id.*

339. *Id.*

340. *Id.* at 50-51.

water courses, the court of appeals dealt with the question of ownership of the river bed of a new man-made water course on the Colorado River.³⁴¹

In *Selkirk Island Corp. v. Standley* both parties claimed title to a portion of a river bed pursuant to a warranty deed executed by a common source of title.³⁴² The appellant argued that the appellee's conveyance limited the title to only the riverbank, and that he held true title to the disputed riverbed. The court disagreed with the appellant and held that a conveyance of property adjacent to a stream, navigable or not, also constitutes a conveyance of one-half of the adjacent riverbed,³⁴³ subject to rights the public may have to the river or riverbed.³⁴⁴ While the Colorado River is navigable and a "public river," it flowed across a portion of the property in question only by virtue of an easement created by the common ancestor in title to Magorda County.³⁴⁵ Thus, this particular river bed remained privately owned.

X. FORECLOSURE AND EXECUTION

The Dallas court of appeals, in *Group Purchase, Inc. v. Lance Investments Co.*,³⁴⁶ reversed a summary judgment in favor of a former owner of residential property who brought suit to set aside an execution sale and to cancel a sheriff's deed based upon gross inadequacy of price at the sheriff's sale. The trial court had granted summary judgment for the corporate owner of the property sold at a sheriff's sale based solely upon an affidavit of a broker.³⁴⁷ The court noted that summary judgment may properly be based on the uncontroverted testimonial evidence of expert witnesses only where the expert witnesses testify "as to subject matter concerning which the trier of fact must be guided solely by the opinion testimony of experts."³⁴⁸ Land value does not fit that description. Thus, the trial court should not have accepted the testimony.³⁴⁹

*Mercer v. Daoran Corp.*³⁵⁰ is a significant opinion involving the effect of renewal and extension agreements on lien priority and in which the court detailed the relationship between articles 5520 and 5522 of the Civil Statutes. The question concerned the ability of a junior lien holder to gain priority if a senior lien holder fails properly to renew and extend the senior lien.³⁵¹ In 1974 Charles and Pauline Ducroz, son and mother, signed a promissory note and deed of trust naming the bank as beneficiary. In February, 1975 Jon

341. *Selkirk Island Corp. v. Standley*, 683 S.W.2d 793, 794 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

342. *Id.*

343. *Id.* at 796.

344. *Id.*

345. *Id.*; see *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 954 (Tex. 1976) (title is not destroyed because land is submerged).

346. 685 S.W.2d 729, 730 (Tex. App.—Dallas 1985, writ ref'd n.r.e.).

347. *Id.*

348. *Id.* at 731; see TEX. R. CIV. P. 166-A(c).

349. 685 S.W.2d at 731.

350. 676 S.W.2d 580, 581-82 (Tex. 1984); see TEX. REV. CIV. STAT. ANN. arts. 5520, 5522 (Vernon 1958), repealed by Acts of 1985, ch. 959, § 9, 1985 Tex. Gen. Laws 7218, 7218 (now found in TEX. CIV. PRAC. & REM. CODE ANN. § 16.035-.037 (Vernon Pam. 1986)).

351. 676 S.W.2d at 581.

Mercer obtained and abstracted a judgment against Charles Ducroz. Later in the same year, the Ducrozes executed a second promissory note and deed of trust to the bank. The instruments failed to recite whether they were "in renewal and extension" of the original 1974 debt.³⁵² Mrs. Ducroz acquired the half interest belonging to her son in 1976. In that year and in 1977 and 1978 she executed three additional deeds of trusts that expressly recited that they were "in renewal and extension" of the earlier obligation and security.³⁵³ In September, 1979, the creditor, Mercer, foreclosed upon the property, bought it at the sheriff's sale, and recorded the sheriff's deed. Mrs. Ducroz defaulted on the 1978 note in 1980. The bank foreclosed, bought the property at the sale and recorded the Trustee's deed. The bank later conveyed its interest in the property to Daoran Corporation.

In the petition Mercer claimed title to one-half of the property through the 1975 judgment that he properly abstracted and foreclosed upon.³⁵⁴ Daoran claimed title pursuant to the bank's deed of trust lien which Daoran argued originated prior to Mercer's judgment lien.³⁵⁵ Mercer countered that the 1974 deed of trust lien was the only lien prior to his judgment lien. Mercer also contended that the 1974 deed of trust had not been renewed and extended.³⁵⁶ Thus, a four year statute of limitations barred any claim under the 1974 deed of trust.³⁵⁷ The court, interpreting article 5522,³⁵⁸ held that the 1975 deed of trust did not qualify as an article 5522 contract of extension because it did not mention the 1974 note and lien nor state that it purported to renew or extend the lien.³⁵⁹ Daoran then argued that the protection of articles 5520 and 5522 did not apply to junior lienholders who acquire interests in property upon which a valid prior lien of record exists.³⁶⁰ The supreme court, following an earlier opinion agreed.³⁶¹ The court found that Mercer, having acquired his lien during the time the bank had a valid lien, found no protection through a time bar.³⁶²

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. Article 5522 governs the renewal and extension of contracts. A landowner and a note holder may agree to review and extend a debt and lien only if the rights of other lienholders do not suffer prejudice after the liens become time-banned. TEX. REV. CIV. STAT. ANN. art. 5522 (Vernon 1958) (repealed 1985) (now found in TEX. CIV. PRAC. & REM. CODE ANN. § 15.036-.037 (Vernon Pam. 1986).

359. 676 S.W.2d at 582.

360. *Id.*

361. In *Novosad v. Svrcek*, 129 Tex. 34, 102 S.W.2d 393, 396 (1937) the court stated that: [t]he primary objects of this article [article 5223] appear to be: (1) To protect a purchaser or lien holder for value and without notice from a prior lien upon land, when it appears from the record that such note or notes for which a prior lien was given are barred by limitations; and (2) not to protect the lien holder who acquires a lien with full knowledge of a valid existing prior lien, then in full force, from a renewal and extension of such prior lien by the owner of the land, although such renewal and extension may be executed either before or after such prior lien appears to be barred by limitation.

362. 676 S.W.2d at 682.

The court further found that Mercer did not qualify as a "bona fide third person"³⁶³ within the meaning of article 5520 and, accordingly, the statutory presumption that a debt is paid after the four-year limitations period did not apply to Mercer.³⁶⁴ As a result, neither article 5520 nor article 5522 protected Mercer, and any renewal and extension agreement between the Ducrozes and the bank would prevent him from recovery.³⁶⁵

The final step in the Court's analysis was to determine whether any valid renewal and extension agreement ever existed. The bank relied upon the affidavit of its president conclusively stating that the indebtedness was "renewed and extended."³⁶⁶ The court held that a legal conclusion is insufficient to raise an issue of fact in response to a motion for summary judgment, and accordingly could not establish the existence of a fact in support of a motion for summary judgment.³⁶⁷ The bank attached a copy of a renewal note to the bank president's affidavit, but that note had not been executed. The bank neither produced the original note nor explained its absence. Thus, the best evidence rule kept the original note's contents in issue.³⁶⁸ The trial court erred in granting the summary judgment based upon the renewal copy.³⁶⁹

Two cases involved homestead issues in a foreclosure setting. In *Johnson v. First Southern Properties, Inc.*,³⁷⁰ the court decided whether an assessment lien pursuant to a condominium declaration existed prior to the condominium homeowner's homestead rights. The appellant purchased an apartment subject to a lien held by the homeowner's council for unpaid assessments. The council had authority to enforce the lien through foreclosure.³⁷¹ The appellant challenged the exercise of the council's authority, claiming homestead protection.³⁷² The appellant construed the homestead provisions to prevent any forced sale of a homestead if the lien does not meet any of the exceptions listed to the prohibition of forced sales.³⁷³ The court, however, subordinated the homestead claim to the lien.³⁷⁴ The lien constituted a pre-existing debt which overcomes homestead rights, found the court.³⁷⁵ The court further found that the condominium act provision for preferential payment on resale³⁷⁶ did not create the exclusive means of recovery of assess-

363. A "bona fide third person" is someone who acquires an interest in property when the lien debt is over four years past due and no renewal or extension exists. TEX. REV. CIV. STAT. ANN. art. 5520 (Vernon 1958) (repealed 1985) (now found in TEX. CIV. PRAC. & REM. CODE ANN. §§ 15.035-.037 (Vernon Pam. 1986).

364. 676 S.W.2d at 682.

365. *Id.*

366. *Id.* at 583.

367. *Id.*

368. *Id.* at 584.

369. *Id.*

370. 687 S.W.2d 399, 401 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).

371. See Act of June 21, 1975, ch. 723, § 1, 1975 Tex. Gen. Laws 2354, 2354, repealed by Act of June 19, 1983, ch. 576, § 6, 1983 Tex. Gen. Laws 3729, 3729.

372. See TEX. CONST. art. XVI, § 50.

373. *Id.*; see TEX. PROP. CODE ANN. § 42.002 (Vernon 1984).

374. 687 S.W.2d at 401.

375. 687 S.W.2d at 401-402.

376. TEX. PROP. CODE ANN. § 81.208 (Vernon 1984).

ments, and that the co-owners were free to establish other remedies among themselves.³⁷⁷

In *Villarreal v. Laredo National Bank*³⁷⁸ a wife sued to enjoin a foreclosure sale arising from a home improvement note that she and her ex-husband executed. The husband had obtained title to the former homestead under a divorce decree entered well after the note upon which the foreclosure was sought. Pursuant to the express recital of the decree the wife had retained the right to occupy the premises until the youngest child had reached the age of eighteen.³⁷⁹ The San Antonio court held that a wife can have a homestead claim in property in which she has no fee ownership interest.³⁸⁰ It also ruled that the husband could not renew a debt on that homestead property, even though a divorce had occurred.³⁸¹ Apparently, after the divorce the husband had executed a real estate lien note payable to the bank together with a deed of trust containing language of "renewal and extension."³⁸² The bank foreclosed on the deed of trust. The court determined that placing title in the husband alone following divorce did not dispense with the requisite that the wife must participate in a renewal and extension of a debt against an existing homestead.³⁸³ Accordingly, the husband could not renew and extend the lien upon the homestead without the wife's consent.³⁸⁴

XI. LEGISLATION

The following is a brief review of the major enactments of the 69th Legislature concerning topics within the scope of this Article. The reader should consult the session laws for the complete texts.

House Bill 351³⁸⁵ amended article 6626 of the Civil Statutes. Plans to revise subdivision plats now require that notice must be published three times within a period beginning on the seventh day before the date of the meeting.³⁸⁶

In a significant step, the Legislature enacted the Texas Timeshare Act.³⁸⁷ Section 3(a)(2)-(4) requires a detailed declaration of each unit, including size and an interior floor plan, a description of amenities, and a statement of the fractional part which each unit bears to the whole.³⁸⁸ A timeshare unit is now an interest in land for purposes of the Real Estate License Act,³⁸⁹ arti-

377. 687 S.W.2d at 402.

378. 677 S.W.2d 600, 603 (Tex. App.—San Antonio 1984, writ ref'd n.r.e.).

379. *Id.* at 604.

380. *Id.* at 606-607.

381. *Id.* at 607.

382. *Id.* at 604.

383. *Id.* at 607.

384. *Id.*

385. Tex. H.B. 351, 69th Leg. (1985).

386. TEX. REV. CIV. STAT. ANN. art. 6626c (Vernon Supp. 1986).

387. Tex. S.B. 92, 69th Leg. (1985) (current version at TEX. REV. CIV. STAT. ANN. art. 6573c (Vernon Supp. 1986)).

388. TEX. REV. CIV. STAT. ANN. art. 6573c, § 3(a)(2)-(4) (Vernon Supp. 1986).

389. TEX. REV. CIV. STAT. ANN. art. 6573a (Vernon Supp. 1986).

cle 6573a. Importantly, it requires registration of the timeshare property with the Texas Real Estate Commission.³⁹⁰ Section 7 of the Act requires that a disclosure statement be prepared, filed and distributed for any sales promotion involving timeshares.³⁹¹ This section contemplates an elaborate document.

Section 8 gives the purchaser four days to cancel a contract to purchase a timeshare interest if he did not visit the property and view a substantially complete accommodation.³⁹² Section 10 mandates and regulates escrow accounts for the protection of purchasers' deposit.³⁹³ Section 11 makes six specific timeshare practices violations of the Texas Deceptive Trade Practices Act.³⁹⁴ Section 12 requires the developer to maintain property to and liability insurance on the timeshare property.³⁹⁵

Other important developments also took place. Senate Bill 641³⁹⁶ permits cities, towns and villages to use or permit the use of rights-of-way of public streets for trees and decorative landscaping, sidewalk cafes, subdivision entrances, certain architectural details of historic buildings, and benches and water fountains incidental to vehicular or pedestrian traffic. House Bill 1218³⁹⁷ extensively revises the Manufactured Housing Standard Act, creating a regulatory framework for modular housing and commercial buildings. Senate Bill 906 made extensive revisions to the escheat provisions of the Texas Property Code.³⁹⁸

Senate Bill 940³⁹⁹ marks an important step. The Community House for the Disabled Persons Location Act⁴⁰⁰ makes a "family home" a permitted use in all residential zones or districts in the State. A "family home" qualifies if it consists of not more than six physically or mentally impaired persons regardless of legal relationship to one another, and two supervisory persons, but restricts any such home from being within one-half mile from a preexisting family home. Deed restrictions to the contrary created after September 1, 1985 are void.

The Legislature amended the Texas Real Estate License Act⁴⁰¹ to provide for more comprehensive regulation of real estate inspectors employed by buyers and sellers of real property.⁴⁰² It requires licensing after examination,⁴⁰³ and provides for a real estate inspection recovery fund⁴⁰⁴ in the

390. TEX. REV. CIV. STAT. ANN. art. 66573c, § 6(a) (Vernon Supp. 1986).

391. *Id.* § 7.

392. *Id.* § 8.

393. *Id.* § 10.

394. *Id.* § 11.

395. *Id.* § 12.

396. Tex. S.B. 641, 69th Leg. (1985).

397. Tex. H.B. 1218, 69th Leg. (1985).

398. Tex. S.B. 906, 69th Leg. (1985); *see* TEX. PROP. CODE ANN. §§ 71.001-.002, 71.007, 71.101, 71.102, 71.107 (Vernon Supp. 1986).

399. Tex. S.B. 940, 69th Leg. (1985).

400. TEX. REV. CIV. STAT. ANN. art. 1011n (Vernon Pam. Supp. 1986).

401. TEX. REV. CIV. STAT. ANN. art. 6573a (Vernon Supp. 1986).

402. *See* Tex. H.B. 2182, 69th Leg. (1985).

403. *Id.* § 18c(j).

404. *Id.* § 18c(e)(i).

event an aggrieved party is unable to collect on a judgment against an inspector for violations of the Act.

The Texas Property Code was amended by H.B. No. 2256 to add a Title II dealing with restrictive covenants applicable to subdivisions. It creates a nonjudicial petition system through which landowners may create, extend, add to, or modify restrictions on the use of property. Non-consenting landowners and lenders may exclude themselves from the operation of the new restrictions.⁴⁰⁵

405. Tex. H.B. 2256, 69th Leg. (1985).

